STATE OF MICHIGAN

COURT OF APPEALS

BRUCE KEEN, SUE KEEN, and PAUL TOTH,

Plaintiffs-Appellants,

and

RONALD D. BROOKS TRUSTEE, a/k/a RONALD D. BROOKS, and KRISTINE EB. YARED TRUSTEE, a/k/a KRISTINE EB. YARED TRUST,

Plaintiffs,

v

OAK SHORES, LLC,

Defendant-Appellee.

UNPUBLISHED
May 15, 2008

No. 273105
Leelanau Circuit Court
LC No. 05-007004-CH

Before: Jansen, P.J., and Zahra and Gleicher, JJ.

PER CURIAM.

In this property dispute over access to Lake Michigan, plaintiffs appeal from the trial court's August 17, 2006 order on the litigants' cross-motions for summary disposition under MCR 2.116(C)(10). Plaintiffs filed a four-count complaint seeking preliminary and permanent injunctions to prevent defendant's members from using defendant's lake front land. The Leelanau County Circuit denied plaintiffs' motion for summary disposition and granted defendant Oak Shore, LLC's motion on Counts I and II of their complaint. The litigants later stipulated to the dismissal of the remaining counts without prejudice and plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition. We affirm.

I. Facts

Plaintiffs are owners of water front residences on Lake Michigan in Glen Arbor, each having 100 feet of lake front land. Defendant is a limited liability company (LLC) consisting of nine couples[1] that are non-riparian property owners in Oak Hollow Condominiums. A portion of the Oak Hollow Condominiums is adjacent to the property owned by plaintiffs Bruce and Sue Keen. In May 2005, defendant purchased the residential parcel located between the parcel owned by the Keens and the parcel owned by plaintiff Paul Toth.[2] Defendant's parcel also has 100 feet of lake front land.

All of the parcels at issue are zoned "Residential I" under the then existing Glen Arbor zoning ordinance. Around the time that defendant purchased its parcel there was local controversy about use of riparian parcels by multiple non-riparian owners, which the Glen Arbor ordinance labels as "keyholing." Two of defendant's members contacted Glen Arbor Zoning Administrator Robert Hawley concerning whether the zoning ordinance allowed use of the parcel in question by residents in Oak Hollow Condominiums. Hawley acknowledged that defendant's proposed lot and waterfront use by multiple families for recreational activities and lake access was not prohibited by the Glen Arbor Ordinance. Hawley concluded that a land use permit was not necessary for defendant's proposed use of the parcel.[3]

In the summer of 2005, defendant's members began using the parcel for various recreational activities, including swimming, sunbathing, walking, kayaking, and picnicing. They accessed the parcel through a walking path on the Oak Hollow Condominium property. Plaintiffs became concerned about the foot traffic between the condominiums and the beach and whether defendant's use would increase as the number of condominiums in Oak Hollow increased. Plaintiffs also became concerned that defendant's use would affect their property value.

In September 2005, plaintiffs filed a complaint against defendant seeking to enjoin defendant's use of the property, alleging, among other things, that the use violated the zoning

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[1] The contribution agreement for defendant limits its membership to no more than 15 couples.

[2] Defendant's parcel is between the parcels owned by plaintiff Toth and plaintiffs Keen. Plaintiffs Brooks, Yared, and their respective trusts are not participating in this appeal.

[3] On April 19, 2005, the township planning commission issued a 180-day moratorium "on the issuance of any land use permits and/or other zoning approvals for the use, construction, and/or operation, by a non-riparian, of a recreational facility of any type on any navigable water frontage within a residential frontage district." Glen Arbor Township Planning Commission Resolution No.7-2005. In this same time period, the township clerk informed a lakefront property owner that the township would not be taking any action regarding defendant's property use.

ordinance. In November 2005, Glen Arbor significantly amended its ordinance, deleting recreation facilities as a permissible use in Residential I districts and adding other restrictions to multi-family use.

II. Analysis

Plaintiffs first argue that use of lakefront property in residential areas is limited to those uses expressly authorized in the applicable zoning ordinance. Multiple family use of lakefront property in residential areas is not authorized by the zoning ordinance. Specifically, defendant's use of the property does not qualify as a recreational facility under the ordinance. Absent authorization, plaintiffs argue, defendant's use of the property is prohibited. Plaintiffs maintain that when the zoning ordinance is read as a whole it is clear that defendant's use of the parcel is a zoning violation.

For purposes of this appeal, plaintiffs concede that the controlling version of the zoning ordinance is version 3.7, which was in effect at the time defendant purchased the property. The applicable provisions of this ordinance are:

> **SECTION IV.14 LAKE ACCESS**
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> Easement to lake front requirement is thirty (30) feet per residence.
>
> **SECTION IV.15 KEYHOLING**
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> * * *
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> **B.** Definition: When two (2) or more families/legal entities/parties share access on navigable water without residing on said frontage, such common usage and/or ownership of the waterfront shall be governed by this Section. The provisions herein shall apply regardless of whether access to the waterfront is gained by easement, common or joint ownership, single fee ownership, lease, license, site condominium unit, stock or membership in a corporation, or any other means.
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> 1. No more than one watercraft slip, mooring, boat hoist, raft, or any other means of anchorage will be developed per twenty-five feet of water frontage.
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> 2. No more than one dock per one hundred feet (100') of frontage shall be allowed on the water and shall otherwise comply with all state and federal statutes and regulations pertaining thereto.
>
> 3. Boat launch facilities shall not be permitted.
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> * * *
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> **SECTION V.5 RESIDENTIAL I - USES PERMITTED**
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> No building, nor structure, nor any part thereof, shall be erected, altered or used, or land or premises used in part or in whole, for other than one or more of the following specific uses:

A. Single family dwelling.

B. Home occupation, including Bed & Breakfast establishments, provided that there be no external evidence of such occupation except a non-illuminated name sign and that said occupation does not require nor effect any changes in the external character of the building.

C. Churches, Temples

D. Schools.

E. Recreation facilities (non-commercial).

F. Building Lot Area - Each dwelling or other main building hereafter erected in the Residential I District shall be located on a building lot or parcel of land having an average width of not less than one hundred (100) feet and containing not less than fifteen thousand (15,000) square feet of area . . . . [Glen Arbor Zoning Ordinance, arts IV, V, version 3.7, 1/3/05.]

The trial court found that the ordinance did not prohibit defendant's use of the parcel, because the residential use provision permits use as a noncommercial recreation facility and because nothing in the keyholing proscriptions prevented defendant's activities on the parcel. Plaintiffs maintain that the trial court erred by finding that defendant's use of the parcel constitutes a permissible "recreation facility" within the meaning of § V.5(E) of the ordinance. According to plaintiffs, the parcel cannot be a "facility" because it is an undeveloped piece of land. Plaintiffs offer a dictionary definition of the term "facility" and argue defendant's use of the property does not meet that definition.

Plaintiffs' argument is without legal merit for two reasons. First, a necessary precursor to use of a dictionary definition is a determination that the ordinance requires judicial construction. Judicial construction of an ordinance is appropriate only when reasonable minds can differ with respect to the meaning of the ordinance. *Yankee Springs Twp v Fox*, 264 Mich App 604, 608; 692 NW2d 728 (2004). Here, the applicable portions of the ordinance are plain and clear: "No . . . land or premises [shall be] used in part or in whole, for *other than* the listed uses[.]" The listed uses include "[s]ingle family dwelling[s and] . . . [r]ecreation facilities (noncommercial)." Glen Arbor Zoning Ordinance, art V, § V.5(A), (E) (emphasis added). Thus, the ordinance indicates that land may be used as a recreation facility. Absent any ambiguity in the ordinance, no judicial construction is necessary or permissible.

Second, even if judicial construction of the ordinance were necessary, the plaintiffs' proffered dictionary definition would encompass defendant's use of the property. According to plaintiffs, a recreation facility would be a facility that is "built, installed, *or established* to serve a particular purpose." (Emphasis added.) Defendant established the parcel for the particular purposes of sunbathing, swimming, walking, kayak launching and similar recreational activities. The parcel thus falls within the dictionary definition of "facility." Moreover, as the trial court found, the ordinance neither references nor requires the presence of a physical structure for use of land as a noncommercial recreation facility.

Plaintiffs next argue that § V.5(E) of the ordinance must be construed *in pari materia* with the lake access provision in § IV.14 and with the keyholing proscription in § IV.15(B) of the ordinance. As noted above, the lake access provision of the ordinance requires that there be 30 feet of lake front property per residence for each lake access easement. According to plaintiffs, defendant's members have no lake access except by easement expressly or impliedly granted by the LLC. If access is by easement, plaintiffs continue, the easement must be at least 30 feet per residence to comply with § IV.14.

Plaintiffs' argument ignores two basic aspects of the *in pari materia* doctrine: first, the doctrine applies only when provisions relate to the same subject matter; and second, provisions must be construed to avoid conflict when possible. *Michigan Elec Co-op Ass'n v Michigan Public Service Comm*, 267 Mich App 608, 616; 705 NW2d 709 (2005). Nothing in the lake access provision relates to the uses permissible for residential properties, so the two provisions neither relate to the subject matter nor do they conflict. Further, even if the provisions were in conflict, plaintiffs are incorrect in their assertion that defendant's members access the lake by easement. The ordinance defines "easement" as "a right or privilege that a person or persons may use another's land." Glen Arbor Zoning Ordinance, Definitions. Here, defendant's members own the land through their membership in defendant, an LLC. The members' rights to lake access are not granted by easement.

In sum, defendant's use was consistent with the zoning provisions applicable at the time defendant purchased and began using the property. The use is thus a lawful nonconforming use. See *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627 (1993).

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher